89-1236

Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

BOARD OF COUNTY COMMISSIONERS
OF LAWRENCE COUNTY, OHIO

Petitioner

v.

L. ROBERT KIMBALL & ASSOCIATES

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Should a court defer to a commercial arbitration award that disposes of rights asserted under statutory law and public policy in the absence of any explanation by the arbitrator of the basis for the decision or the issues decided?

2. Should a court defer to a commercial arbitration award where the underlying contract as well as the award is challenged as violating statutory law and public policy?

3. Whether a decision of a state's highest court coupled with an appellate court decision and a state statute are sufficient to establish a "well-defined and dominant public policy"?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 860 F.2d 683 (6th Cir. 1988) and is reproduced herein as Appendix A. The subsequent decision of the Sixth Circuit denying the petition for a rehearing was entered on October 31, 1989 and is reproduced herein as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on November 3, 1988. A petition for rehearing was filed on December 1, 1988 and denied on October 31, 1989. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS

The following statutory and regulatory

provisions are set forth in Appendices E,F,G,H, and I, respectively:

Federal Arbitration Act, 9 U.S.C. §§9, 10, 11
40 C.F.R. 35.917-1
40 C.F.R. 35.937-2, 35.937-3, 35.937-4
40 C.F.R. Part 35, Subpart E, Section 5
Ohio Revised Code §6117.01

BASIS OF FEDERAL JURISDICTION

The United States Court of Appeals for the Sixth Circuit had jurisdiction over this case by virtue of 28 U.S.C. §1291.

STATEMENT OF THE CASE

A. Course of proceedings and disposition in court below.

On February 22, 1985, petitioner, the Board of County Commissioners of Lawrence County, Ohio ("the County") filed a complaint in the Common Pleas Court of Lawrence County, Ohio, alleging a violation of the Ohio antitrust laws by L. Robert Kimball and Associates ("Kimball"). On March 5, 1987, Kimball removed the case, on the basis of

diversity jurisdiction, to the United States District Court for the Southern District of Ohio, Western Division. Kimball filed a counterclaim, demanding that the District Court compel arbitration of Kimball's breach of contract claims against the County. The District Court, in an Opinion and Order of May 30, 1985, compelled the parties to arbitrate the breach of contract claims. On March 20, 1986, an arbitration panel awarded $137,531.00, over $130,000 of which was lost future profits, to Kimball based on Kimball's breach of contract claims against the County. The panel did not set forth the basis of its award, nor explain its decision in writing.

Thereafter, petitioner filed its Second Amended Complaint and moved the District Court to vacate the arbitration award on public policy grounds. The District Court, in an Opinion and Order of March 18, 1987 and a Judgment Entry of June 9, 1987, vacated the

arbitration award on the ground that the award and the underlying contracts between Kimball and the County violated the well-established public policy of the State of Ohio against a county entering into indefinite term contracts, and also were invalid under certain federal laws and regulations governing federally funded projects. The Opinion and Order and the Judgment Entry are reproduced herein as Appendices C and D, respectively.

The Summary Judgment Order of March 18, 1987 was certified by the District Court on June 9, 1987 pursuant to F.R.C.P. 54(b) as a final judgment with no just reason for delay of appeal. Kimball appealed, and the United States Court of Appeals for the Sixth Circuit reversed the judgment and remanded the case for enforcement of the award on November 3, 1988. (860 F. 2d 683). On December 1, 1988, the County petitioned the Sixth Circuit for a rehearing, which petition was denied on October 31, 1989.

B. Statement of Facts

Kimball is an engineering firm based in Ebensburg, Pennsylvania, with a branch office in Huntington, West Virginia, which is directly across the Ohio River from Lawrence County, Ohio. Kimball entered into two contracts with the County in 1971, under which Kimball was to perform certain engineering services for the County, including preparation of two preliminary engineering reports, additional consulting work, and assistance to the County in obtaining grants for a proposed county-wide sewer system. A "life-of-the-project" clause in both contracts provided that, while the County was not obligated to pay for the preliminary reports until funding for the project was obtained, Kimball was guaranteed all subsequent engineering services whenever the County went forward with the sewer project. /1/

/1/ Section I, B. 6 of each contract reads as

-Continued-

The 1971 contracts had no term provisions, and bound the County and future boards of Commissioners beyond the terms of office of the Commissioners holding office in 1971. Kimball prepared one preliminary engineering report in 1971 and a second one in 1972, but after 1973 there was no activity of any kind on Kimball's part regarding these reports or any sewer project, nor were the reports ever the basis for any government funding.

Kimball had no contact with the County whatsoever with regard to these contracts from 1973 until 1984, when Kimball learned that the County was to receive federal funding for a

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follows: "In the event that any or all of the recommended sewer district Projects proceed beyond the Preliminary Engineering Report Phase, the Owner agrees to engage the Engineer to perform all other phases of the work of each sewer district in accordance with this Agreement."

county-wide sewage system. Kimball then sent a demand letter to the County, insisting that the County award Kimball the engineering work for the project pursuant to the 1971 contracts.

Between 1973 and 1984, changes in federal laws and regulations rendered Kimball's preliminary engineering reports inadequate as a basis to obtain federal funding for any sewer project. In 1972, the Federal Water Pollution Control Act, 33 U.S.C. § 1251 et seq., was amended, changing the funding requirements for sewer projects. Under the new regulations that became effective on February 11, 1974, the County was required to produce a much more comprehensive document, known as a facilities plan, in order to obtain goverment funding. 40 C.F.R 35.917-1. In February 1976 the Army Corps of Engineers volunteered to prepare such a plan, which was later to become the basis for a government grant for a sewerage project.

In 1978, in anticipation of imminent federal funding, the County hired another engineering firm, Burgess & Niple, Ltd., to do the design work for the project. In fact, before the project could be funded, the facilities plan required several revisions, which Burgess & Niple performed for the County under a separate contract. In 1984, more than 10 years after Kimball's last work under its 1971 contracts, when the EPA finally declared the sewer project proposed in the revised facilities plan to be fundable, Kimball re-emerged and demanded that its 1971 contracts be honored.

In 1984, when the County refused to award the engineering work to Kimball or to repudiate the County's 1978 contract with Burgess & Niple, Kimball demanded arbitration of its breach of contract claims against the County before the American Arbitration Association, as provided in the 1971 contracts. Kimball

asserted that the County had breached the 1971 contracts when it hired Burgess & Niple in 1978. The arbitration panel awarded over $130,000 in lost future profits to Kimball on March 20, 1986. The panel issued no written decision to explain the basis of its award, or to indicate in any way whether the panel even considered the issue of the validity of the contracts under state and federal law, or whether the panel was merely interpreting the contracts.

REASONS FOR GRANTING WRIT

I.

A REVIEWING COURT SHOULD NOT DEFER TO AN ARBITRATION AWARD WHERE (1) THE UNDERLYING CONTRACT IS CHALLENGED AS VIOLATING STATUTORY LAW AND PUBLIC POLICY AND (2) THE ARBITRATORS GIVE NO BASIS FOR THE AWARD.

In spite of the County's challenges to the validity of the Kimball contracts, the Court of Appeals refused to make an independent

determination whether or not the Kimball contracts violated federal law, even though the arbitration panel made its award without any explanation. Despite the absence of a written opinion by the arbitrators, the Sixth Circuit was willing to "assume" that the arbitrators had actually considered and decided important issues of law:

> Although they issued no written opinion, one must of necessity assume that the arbitrators in order to rule for Kimball, determined that the contracts were valid, enforceable contracts between the parties - that they were neither ultra vires nor inconsistent with federal statutes and regulations - and that Lawrence County had breached the contracts.

860 F.2d at 686. After making this assumption, the Court was then somehow able to determine which legal issues had been decided and which had not:

> The arbitrators did not decide whether the contracts were against public policy, but rather, interpreted and applied the contracts to determine whether they were consistent with federal law and regulations.... Id. at 688.

Finally, the Court deferred to the "assumed" decision by the arbitrators on the contracts' validity, concluding that there was no "manifest disregard" of the law, since "the contracts could be interpreted in a manner consistent with federal statutes and regulations...." Id. (Emphasis added.)

Without explaining this possible interpretation, the Court of Appeals rejected the District Court's detailed analysis which concluded that the contracts violated federal law. The District Court, on pages 8 and 9 of its Opinion and Order of March 18, 1987, reviewed the changes in federal regulations under the 1972 amendments to the Water Pollution Control Act, 33 U.S.C. §1251 et seq. As the District Court pointed out, under these regulations, a preliminary engineering report such as the one done by Kimball was no longer adequate to secure a government grant (40 C.F.R. §§35.917 et seq.). New hiring

regulations effective in 1976 (40 C.F.R. Part 35 Subpart E) required that certain terms be included in the contract with the engineers, including the right of the owner to terminate for its convenience and the prohibition of any recovery of lost anticipated profits by the terminated engineer for work not performed; these terms were not included in Kimball's contract, but were included in Burgess & Niple's contract in 1978.

The District Court also noted the requirements of competitive negotiation, evaluation of competing firms, and evaluation of proposals, under 40 C.F.R. §35.937-2,-3, and -4, which would have made the Kimball contracts invalid, since they were not competitively negotiated. Based upon its recognition of these changes in federal law, the District Court concluded that Kimball's contracts were invalid under applicable federal law and regulations, and that the County would in any

event have been free to terminate Kimball for its convenience, with no claim for lost profits.

The District Court's independent analysis of these statutory duties is necessitated by the Supreme Court's recent expansion of the scope of arbitrable matters. See, Shearson/ American Express, Inc. v. McMahon, 482 U.S. 220 (1987) (claims under RICO and the Securities Exchange Act); Mitsubishi Motors Corp. v. Soler-Chrysler Plymouth, Inc., 473 U.S. 614 (1985) (antitrust claims). Although the Supreme Court has not specifically decided what procedural safeguards will be necessary before a court will defer to an arbitration award that touches upon such issues, the Court has indicated that with this expansion of the arbitral authority, the courts will have a corresponding duty to scrutinize arbitration awards "to ensure that arbitrators comply with the requirements of the statute" applicable to

the claim. Shearson/American Express, supra, 482 U.S. at 232.

Where arbitration awards involve issues of statutory law (in contrast to issues of pure contract interpretation), the Court has at least indicated that a written explanation by the arbitrator will be required. For example, in Mitsubishi Motors, supra, the Court emphasized that a reviewing court must be able to determine, at a minimum, that the statutory claims were "actually decided" by the arbitrator. 473 U.S. at 638. The Court further emphasized that, in the case before it, which involved antitrust claims and an arbitration conducted pursuant to the Rules of the Japan Commercial Arbitration Association, a reviewing Court would be able to scrutinize a written decision of the arbitrators, since the applicable arbitration rules required "a statement of reasons for the award...." 473 U.S. at 638 n.20.

Similarly, in Shearson/American Express, the Court noted that one of the prior objections to arbitrating matters of statutory law had been that "an arbitration award may be made without explanation of [the arbitrator's] reasons...", 482 U.S. 220 at 231, [citing Wilko v. Swan, 346 U.S. 427 at 436 (1953)]. The Court in Shearson concluded, regarding the arbitration of claims under the securities laws, that such objections "do not hold true today for arbitration procedures subject to the SEC's oversight authority." 482 U.S. at 232. Indeed, the code of arbitration developed by the SEC requires a statement by the arbitrators of the issues they have resolved. NASD Code of Arbitration Procedure, §41(e).

Although courts have certainly been willing to defer to arbitration awards that merely interpreted contracts, without requiring the arbitrators to state the grounds for their opinions, petitioner can find no reported cases

where a court deferred to an unexplained arbitration award on questions of external law that challenged the validity of the underlying contract. In United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960) the Court indicated that an arbitrator has no obligation to give his reasons for an award and the award was not subject to court review where "the arbitrator's decision concerns construction of the contract...." (Emphasis added.)

No such deference has been shown, however, where an arbitrator disposes of statutory claims. In the context of claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C §1983, and under the Fair Labor Standards Act, this Court has not only refused to allow such claims to be disposed of by arbitration, but has refused to give any weight to the arbitration award unless it "gives full consideration" to and actually "decide[s]" the statutory claim. Alexander v. Gardner-Denver

Co., 415 U.S. 36, 60 n. 21 (1974); McDonald v. City of West Branch, 466 U.S. 284, 292 n. 13 (1984); Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 743 n. 22 (1981).

In the absence of a written opinion by the arbitrators, a court cannot assume that the arbitrators decided or even considered legal issues relating to the validity of the contracts. In fact, an arbitrator may assume that he lacks jurisdiction to invalidate the underlying contract based upon external law. This assumption would reflect the well-established principle that "[t]he arbitrator... has no general authority to invoke public laws that conflict with the bargain between the parties.... If an arbitral decision is based 'solely upon the arbitrator's view of the requirement of enacted legistation', rather than on an interpretation of the collective-bargaining agreement, the arbitrator has 'exceeded the scope of the submission', and

and the award will not be enforced." McDonald, supra, 466 U.S. at 290- 291, quoting Gardner-Denver Co., supra, 415 U.S. at 53, quoting Enterprise Wheel & Car Corp., supra, 363 U.S. at 597.

In the present case, there is no way to know whether the arbitrators considered or decided the issue of whether the contracts violated federal law. The arbitrators could have been guided by the long-established principle that they have "no general authority to invoke public laws that conflict" with the contract. In the absence of a written opinion, a reviewing court must independently consider and decide these issues.

II.

THE ARBITRATION AWARD IS NOT ENTITLED TO ANY DEFERENCE WHERE THE UNDERLYING CONTRACTS VIOLATE LAW AND PUBLIC POLICY

The Court has repeatedly declared that an arbitration award may be vacated on public

policy grounds, relying upon the common law doctrine "that a court may refuse to enforce contracts that violate law or public policy." United Paperworkers v. Misco, 484 U.S. 29, 42 (1987); W.R. Grace & Co. v. Local 759, 461 U.S. 757, 766 (1983). Although the Court in Misco did not "sanction a broad judicial power to set aside arbitration awards as against public policy," 484 U.S. at 43, the Court also did not determine, as Justice Blackmun pointed out in his concurring opinion, "in what way, if any, a court's authority to set aside an arbitration award on public policy grounds differs from its authority, outside the collective - bargaining context, to refuse to enforce a contract on public policy grounds. Those issues are left for another day." 484 U.S. at 46 (J. Blackmun, concurring opinion.)

The present case involves exactly those issues. The County challenged both the contracts and the arbitration award as

violating both statutory law and public policy. In such a case, a court must thoroughly consider such issues, without deferring to the arbitration award, particularly an award that included no explanation of the decison. See W.R. Grace, supra, 461 U.S. at 766; Hurd v. Hodge, 334 U.S. 24, 34-35 (1948). /2/ Anything less would represent a wholesale delegation of judicial authority to arbitrators, empowering them to decide important issues of law and public policy, with no responsibility to explain the basis of their decision.

III.

THE COURT OF APPEALS REFUSED TO RECOGNIZE A WELL-ESTABLISHED PUBLIC POLICY OF THE STATE OF OHIO

/2/ The issue of the illegality of a contract's terms should be contrasted with a common legal defense to a contract's enforcement, such as fraud in the inducement, which can be decided by an arbitrator. See Prima Paint Corp. v. Flood & Conklin Mfg., 388 U.S. 395 (1967).

The Court of Appeals ultimately concluded that the State of Ohio lacked "any clear legal precedent which establishes a well-defined and dominant public policy" against indefinite term contracts signed by a board of county commissioners. 860 F.2d at 688. This conclusion flies in the face of an Ohio Supreme Court decision, a state court of appeals decision and a statute, all of which hold or have been interpreted to hold that indefinite term contracts, which extend beyond the term of a board of county commissioners, violate public policy unless the public good requires such contracts to be made. The conclusion of the Court of Appeals also placed an unreasonable burden on the County to demonstrate the existence of a public policy to a degree of absolute clarity and precision never suggested or required by any prior decision of the United States Supreme Court.

The Supreme Court of Ohio, in State ex rel. Allen v. Lutz, 145 N.E. 483 (Ohio 1924), interpreted the predecessor version of Section 6117.01 of the Ohio Revised Code to require that a county's contract with an engineer have a specific term. /3/

> While the statute, Section 6602-1, General Code, under which this employment was made, authorized the county commissioners to employ a sanitary engineer "for such time or times and on such terms as they deem best," yet the contract of employment is silent as to any fixed time... Not only must the contract be upon "such terms" as the commissioners deem best, but it is equally mandatory as to such "time or times" as they deem best. In order to bind a subsequent board of county commissioners and future Legislatures, the right and power to do so must clearly appear, and not be left to inference alone from the nature of the contract and the kind of work affected thereby.
>
> * * *

/3/ The operative language of the former statute that the Court in Lutz focused on is virtually identical to that of the present statute, O.R.C. § 6117.01, which requires that such contracts may be for "such time and on such terms as it [the board] deems best."

> [T]his contract ignored the statutory requirement as to "time or times," and was so indefinite in that regard that it transcended the spirit as well as the letter of the statute.... Terms of contract should not be left to inference when one is contracting with a public board whose powers are prescribed by statute. 145 N.E. at 484-485. (Emphasis added.)

Since the contract in Lutz lacked a specific term, in violation of the statute, the Ohio Supreme Court concluded that the contract was not protected by the state's constitutional guarantee against impairment of contract obligations. Ohio Constitution, Art. II, §28. The Court further determined that such indefinite term contracts are generally invalid.

> [T]he general rule is that such contracts, extending beyond the term of the existing board,... thus tying the hands of a succeeding board, are not looked upon with favor unless the necessity or some special circumstances show that the public good requires such contracts to be made. Id. /4/

/4/ The public policy against long-term contracts

-Continued-

Implicitly finding that the engineering contract was not required for the public good, the Court held that the contract was retroactively modified by a later statute that limited the compensation payable by a county to an engineer.

Despite the clear reasoning of Lutz that the engineering contract was void ab initio and therefore not subject to constitutional protection, the Sixth Circuit somehow interpreted Lutz as holding that there was some validity to the engineering contract, "... since [the Ohio Supreme Court] allowed the [contract] before it to stand, to the

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was well established in Ohio prior to Lutz. In a case involving a one-year contract with a janitor that would bind a succeeding board, the Franklin County Circuit Court, in Board of Commissioners v. Ranck, 9 Ohio C.C. 301, 308 (1895) held that the contract was "against public policy, and void... in the absence of some necessity or special circumstances showing that the public good required it...."

extent that compensation was limited by statute". 860 F. 2d at 687. This interpretation not only ignores the Supreme Court's reasoning that the contract was invalid ab initio, but also ignores the fact the County in Lutz was not seeking recovery of the payments made to the engineer which were below the amount of the statutory limitation. It is therefore not suprising that the Ohio Supreme Court did not suggest that the engineer return the prior payments, which did not exceed the statutory limitation.

In contrast to the District Court which could "surmise no reason why the public good requires indefinite contracts such as the one at issue here" (Opinion and Order of March 19, 1987, at p. 8), the Court of Appeals used its misreading of Lutz to avoid analyzing whether any public good required the Kimball contracts. The Court of Appeals concluded that "[b]ecause we are unable to discern any

telling differences . . . between the contract for engineering services in Lutz, and the one entered into by Lawrence County's Board of Commissioners, we may confidently conclude that Ohio courts would deem the latter to involve 'necessity or some special circumstances.'" 860 F.2d at 687. The Circuit Court's inability "to discern any telling differences" in the several contracts is remarkable since the engineer in Lutz actually performed the work for which he sought and was denied compensation, in contrast to Kimball's demand for lost future profits for work never performed.

The Court of Appeals then proceeded to distinguish a state appellate court decision, Hubbard v. Hiltz, 31 Ohio Law Abs. 538 (Allen Cty. 1940), on the ground that the language of Hiltz that indefinite term contracts are invalid as a matter of law was dicta and was inconsistent with the Sixth Circuit's analysis

of Lutz. The requirement that a statement of law be a holding and not dicta for a public policy to exist has never been suggested by the Supreme Court. The Sixth Circuit's view that Hiltz is inconsistent with Lutz is based on the Circuit Court's own erroneous interpretation of Lutz.

The Court of Appeals' ultimate conclusion that Ohio lacks a well-defined and dominant public policy ignores the overwhelming authority in Ohio demonstrating such a public policy, as shown in its statutes and in the pronouncements of its highest courts. The Court of Appeals failed to follow the principle articulated in Misco and W. R. Grace, supra, that the public policy is "to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" 484 U.S. at 43, 461 U.S. at 766. In Muschany v. United States, 324 U.S. 49 (1945),

upon which Misco and W.R. Grace relied, the Supreme Court only required that there be "definite indications in the law of the sovereignty" or a "plain indication" of the public policy. Id. at 66.

In summary, the Circuit Court refused to make an analysis of whether Kimball had proven an exception to the general rule that such indefinite term contracts are invalid. There was no evidence, as found by the District Court, that any public good required Lawrence County to enter into a contract that forever bound the County to award the engineering contract to Kimball if the County ever went forward with a sewer project. Neither Kimball nor any one else has suggested a reason why the public good would require such an onerous and oppressive contract, one that would deprive subsequent boards of any discretion to select an engineer for a multimillion dollar sewer project. The fact that Ohio law requires a

court to consider whether there is a public necessity which would justify an exception to the public policy prohibiting indefinite term contracts does not render this public policy less well-defined. In this case, the District Court, unlike the Court of Appeals, made a thorough analysis of the contracts and properly concluded that they were not required for the public good.

CONCLUSION

For the reasons stated herein, a Writ of Certiorari should issue to the Court of Appeals for the Sixth Circuit to review its judgment herein.

Respectfully submitted,

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No.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

BOARD OF COUNTY COMMISSIONERS
OF LAWRENCE COUNTY, OHIO

Petitioner

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L. ROBERT KIMBALL & ASSOCIATES

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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APPENDIX A

Opinion of the United States Court of Appeals for the Sixth Circuit

No. 87-3635

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BOARD OF COUNTY COMMISSIONERS OF LAWRENCE COUNTY, OHIO,	:	
Plaintiff-Appellee,	:	ON APPEAL from the United States District Court
V.	:	for the Southern District of Ohio.
L. ROBERT KIMBALL AND ASSOCIATES,	:	
Defendant-Appellant.	:	

Decided and Filed November 3, 1988

Before: WELLFORD and NORRIS, Circuit Judges; and COOK District Judge.*

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*The Honorable Julian A. Cook, Jr., Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

ALAN E. NORRIS, Circuit Judge. L. Robert Kimball and Associates ("Kimball") appeals the district court's having granted summary judgment to the Board of County Commissioners of Lawrence County, Ohio. The court reasoned that contracts relied upon by Kimball in its claim against the county are unenforceable as a matter of public policy.

During 1971, Kimball, an engineering firm, entered into two contracts with Lawrence County to provide it with preliminary engineering services for a proposed county-wide sewage treatment system and for improvements to an existing treatment plant. These preliminary services included Kimball's acting as the county's representative in the development phases of the project and producing a preliminary engineering report to be used in obtaining government funding. Under the contracts, if the project proceeded beyond the preliminary stage, the county was to compensate Kimball for the preliminary services and to hire the company to perform the subsequent engineering work. The contracts also provided for arbitration "of all questions in dispute under this Agreement. . . in accordance with the rules of the American Arbitration Association."

From 1971 until 1973, Kimball acted as the county's representative in dealing with health and water authorities and pollution control agencies, and prepared preliminary reports on the proposed system and on improvements to the existing system. According to Kimball, the firm became less involved in the project in 1973 due to the increasing involvement of the Army Corps of Engineers, and the passage of amendments to the Federal Water Pollution Control Act. After 1973, and until 1984, there was no contact between the county and Kimball on the projects. However, during this period there were changes in federal laws concerning funding and plan requirements; the Corps of Engineers researched and completed a facilities plan which was accepted by the county; and in 1978, the county hired another engineering firm to do the engineering work as contemplated by the Corps plan. The plan was revised several times, both by the Corps and

the new engineering firm. It received tentative approval by the Environmental Protection Agency in early February 1984.

In April 1984, when Kimball learned that the sewage project was being funded and was going forward with new project engineers, it demanded compensation for the work it completed in 1971 and 1972, and insisted that it be retained to perform final design work. When the county refused, Kimball demanded arbitration. Although an arbitration hearing was scheduled, the county filed a complaint in the state court of common pleas, asserting a state law claim for damages and seeking an injunction against the arbitration proceedings. On Kimball's motion, the state court proceedings were removed to district court, where Kimball filed a counterclaim requesting a stay of the proceedings pending arbitration under the provisions of the United States Arbitration Act.

In May 1985, the district court issued an order granting Kimball's motion for a preliminary injunction and requiring the county to arbitrate. Basing its decision on Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967), the district court concluded that the county's claim that the contracts were ultra vires because they were for an indefinite term was a legal defense to the enforceability of the contract which properly should be referred to arbitration.

The claims were arbitrated before a three-member panel appointed under the rules of the American Arbitration Association, and the panel entered an award for Kimball.

The county then sought to vacate the arbitration award, and moved for summary judgment. Kimball counterclaimed seeking confirmation of the award, and also moved for summary judgment. The district court granted the county's motion for summary judgment and

vacated the arbitration award, saying it had reevaluated its previous order to arbitrate and concluded that, under AT&T Technologies, Inc. v Communications Workers, 475 U.S. 643 (1986), it had the power to determine that the contract dispute was not subject to arbitration. The court then addressed the merits of the parties' claims and declared the contracts invalid as a matter of public policy, since they contained no definite term and could extend beyond the "life" of the board of county commissioners which agreed to the contract. The court also concluded that the contracts were contrary to public policy because they conflicted with federal law enacted after the contracts were entered into. The court did not address the county's state law claims. Its order was certified pursuant to Fed. R. Civ. P. 54(b), and this appeal followed.

We conclude that the district court's initial decision, that the contract dispute and

the county's defense that the contract was ultra vires should be arbitrated, was correct, and that public policy does not require that the arbitration award be overturned.

In Prima Paint, the plaintiff's claim that the contract, which contained an agreement to arbitrate, was fraudulently induced was held to have been properly referred to arbitration for resolution. The Supreme Court determined that, under the provisions of the United States Arbitration Act, a federal court is to order arbitration if the making and performance of the agreement to arbitrate itself is not in dispute. 388 U.S. at 403-04. The plaintiff in Prima Paint did not claim that the agreement to arbitrate was fraudulently induced, and there was no indication that the broad language of the arbitration agreement was not intended to cover legal issues such as fraudulent inducement of a contract.

Similarly, the question before the district court was not whether the dispute was subject to arbitration. Instead, the question involved the validity of contracts which happened to include provisions for arbitration. Under Prima Paint, resolution of that question was for the arbitrators. The county's claim that the contracts were ultra vires is a legal defense to the enforceability of the contracts. Rather than contending that it had not agreed to the broad arbitration clause in the contracts, the county instead questioned the enforceability of the entire contract. Had it contended that its dispute with Kimball over reimbursement and hiring was not subject to arbitration, we would be faced with a different question, since "[i]t [is] for the court, not the arbitrator, to decide in the first instance whether the dispute [is] to be resolved through arbitration." AT&T Technologies, Inc., 475 U.S. at 651.

Once it is determined that a dispute should be referred to arbitration, questions of contract interpretation are within the province of the arbitrator. Courts play only a limited role in reviewing an arbitration decision. "The courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract." United Paperworkers Int'l Union v. Misco, 108 S.Ct. 364, 370 (1987).

The county's claims that the contracts were ultra vires and were inconsistent with federal statutes and regulations were presented and argued to the arbitrators. Although they issued no written opinion, one must of necessity assume that the arbitrators, in order to rule for Kimball, determined that the contracts were valid, enforceable contracts between the parties -- that they were neither ultra vires nor inconsistent with federal

statutes and regulations -- and that Lawrence County had breached the contracts.

The district court also held that, because the contracts were for an indefinite term, they violated Ohio's public policy against such contracts, and that the contracts also violated public policy because they were inconsistent with subsequently enacted federal law and regulations.

Whether an arbitration award violates public policy is a question for the court. W.R. Grace & Co. v. Local Union 759, Int'l Union of Rubber Workers, 461 U.S. 757, 766 (1983). However, a court's refusal to enforce "an arbitrator's interpretation of such contracts is limited to situations where the contract as interpreted would violate 'some explicit public policy' that is 'well defined and dominant, and is to be ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interests."'"

Misco, 108 S.Ct. at 373 (quoting W.R. Grace, 461 U.S. at 766). A court may refuse to enforce an award when specific terms in the contract would violate public policy, but there is no broad power to set aside an arbitration award against public policy. Id.

The county argues that a different standard of review applies to a court's review of an arbitration award challenged on public policy grounds, than to the court's review of an arbitration award under the Arbitration Act. It cites Iowa Elec. Light & Power Co. v. Local Union 204 of the Int'l Bhd. of Elec. Workers, 834 F.2d 1424 (8th Cir. 1987), for the proposition that the court should engage in a de novo review of an arbitration award whenever a question of public policy is raised.

Iowa Electric dealt with the question of whether an arbitration award, which reinstated an employee who had violated nuclear safety regulations and whose actions could have

jeopardized the public health and safety, was against national public policy concerning strict compliance with safety regulations at nuclear facilities. Id., 834 F.2d at 1426. Here, the contract itself is asserted to be against public policy, and the arbitration award is challenged because it is said that it would enforce an ultra vires contract.

Moreover, properly speaking, the review given an arbitration award when it is challenged on public policy grounds is not de novo. When a court reviews an issue under a de novo standard of review, the court is determining questions of fact and law as though the reviewing court was the original trial court (or the arbitration panel). An arbitration award is not to be based on public policy considerations, since public policy questions are for the court, not the arbitrator. An arbitrator who bases an award on public policy considerations exceeds his

powers. Accordingly, when an arbitration award is challenged on public policy grounds, the court must determine whether the arbitrator's interpretation of the contract jeopardizes a well-defined and dominant public policy, taking the facts as found by the arbitrator.

In addressing the question of whether the contracts as interpreted by the arbitrators were contrary to public policy because they were for an indefinite term, the district court correctly looked to Ohio law to determine whether there was a well-defined and dominant public policy against such contracts. In concluding that Ohio has such a policy, the district court relied upon State ex rel. Allen v. Lutz, 111 Ohio St. 333, 145 N.E. 483 (1924), and State ex rel. Hubbard v. Hilty, 31 Ohio Law Abs. 538 (Ct. App. 1940). We are unable to agree with the district court's reading of these cases.

The Ohio Supreme Court's opinion in Lutz

includes this language:

> In order to bind a subsequent board of county commissioners. . . , the right and power to do so must clearly appear, and not be left to inference alone from the nature of the contract and the kind of work affected thereby.
>
> The policy of the law is rather against the power of one board of county commissioners to make contracts so indefinite in time that the same may extend beyond the life of the board, and thus bind another or future board, although in some cases such a contract may be valid and binding even though the performance of some part may be impossible until after the expiration of the term of the majority of the board as it existed when the contract was made. Yet the general rule is that such contracts, extending beyond the term of the existing board, and employment of agents or servants of the county for such period, thus tying the hands of a succeeding board, are not looked upon with favor unless the necessity or some special circumstances show that the public good requires such contracts to be made.

145 N.E. at 484-85, 111 Ohio St. at 338-39.

In Lutz, a sanitary engineer contracted with the county to provide planning and supervisory services in exchange for compensation to be based upon a percentage of

the cost of the public works with which he was involved. After the contract was entered into, the state legislature enacted a statute which limited the compensation paid to a sanitary engineer to no more than that received by the county auditor. The engineer filed a mandamus action to require the county to pay compensation he had earned under the contract in excess of the county auditor's salary. The Ohio Supreme Court, after noting that a statute specifically authorized county commissioners to contract with a sanitary engineer "for such time . . . as they deem best," so long as the length of the term was specified, held that, since the contract before it was for an indefinite term, it did not come within the protection of the state's constitutional guarantee against impairment of contract, and its compensation provision would not be enforceable beyond the statutory limitation. Id. at 483, 111 Ohio St. at 338-39.

Because the rule of law the district court drew from the opinion's quoted language does not appear in the Ohio Supreme Court's official syllabus to its opinion, under the unique Ohio rule, the quoted language does not state the point of law decided in that case. Ohio Supreme Court Rules for the Reporting of Opinions, Rule 1(B) (eff. Mar. 1, 1983). But, even putting the syllabus rule aside, the Ohio Supreme Court did not say that county commissioners are without the power to enter into any contracts extending beyond the current terms of incumbent commissioners, not did it say that all such contracts are contrary to public policy. What the court pointed out in the quoted language was that some contracts of this nature may be ultra vires, and that, as a matter of public policy, they are not looked upon with favor in the absence of "necessity or some special circumstances."

The Ohio Supreme Court did not leave us with any specific guidance as to what Ohio courts should view as "necessity or some special circumstances." However, we may at least be certain that the Ohio Supreme Court viewed some contracts for engineering services which extend beyond the elected terms of county commissioners as involving "necessity or some special circumstances," since it allowed the one before it to stand, to the extent that compensation was limited by statute. Because we are unable to discern any telling differences in that regard between the contract for engineering services in Lutz, and the one entered into by Lawrence County's Board of Commissioners, we may confidently conclude that Ohio courts would deem the latter to involve "necessity or some special circumstances."

Nor do we think the opinion of the Ohio Court of Appeals in Hubbard v. Hilty establishes a well-defined and dominant public

policy. In that case, pursuant to an informal arrangement with a local women's club, county commissioners had employed a female attendant for a courthouse ladies' restroom, after the club had provided furnishings for the room. Some years later, citing economic reasons, the commissioners abolished the position. In an opinion holding that the attendant's civil service status was no protection where a position was abolished, the court of appeals included this dicta about the arrangement:

> [I]f it reached the dignity of an agreement, [it] had no binding force in law, as a Board of County Commissioners is inhibited by law from making any agreement which has the effect of restraining it or its successors in office from exercising any of the discretionary powers vested in it, or performing any of the duties imposed upon it by law. . . .

Hilty, 31 Ohio Law Abs. at 540. We are in no position to say that the court's gratuitous use of this broad language, without reconciling it with the Ohio Supreme Court's opinion in Lutz,

can serve as the basis for concluding that Ohio has a well-defined and dominant public policy against contracts for an indefinite term.

In the absence of any statute prohibiting county commissioners from entering into contracts which may extend beyond the term of the contracting board, and in the absence of any clear legal precedent which establishes a well-defined and dominant public policy, we conclude that the arbitration award is not against public policy and must be enforced.

The district court also held that the contracts violated public policy because they were inconsistent with the federal law and regulations. As we pointed out earlier, the question of inconsistency was presented to and decided by the arbitrators. The arbitrators did not decide whether the contracts were against public policy, but rather, interpreted and applied the contracts to determine whether they were consistent with federal law and

regulations, which was an integral part of resolving the dispute between the parties. Courts normally must enforce an arbitrator's resolution of these issues even if there is an erroneous finding of fact or misinterpretation of law, and an arbitrator's conclusions on legal issues are entitled to deference. Northrop Corp. v. Triad Int'l Mktg. S.A., 811 F.2d 1265, 1269 (9th Cir.), cert. denied, 108 S.Ct. 261 (1987). Deference is not due to the arbitrator's award if there is a "manifest disregard" of the law, see, e.g., Wilko v. Swan, 346 U.S. 427, 436-37 (1953), but that does not appear to be the case here. Because we conclude that the contracts could be interpreted in a manner consistent with federal statutes and regulations, the district court erred in holding that the arbitration award should be vacated as being contract to public policy.

Accordingly, the judgment appealed from is reversed and this cause is remanded to the district court for enforcement of the arbitration award, and for other proceedings consistent with this opinion and according to law.

APPENDIX B

Decision of the United States
Court of Appeals for the
Sixth Circuit

No. 87-3635

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

O R D E R

BOARD OF COUNTY COMMISSIONERS OF
LAWRENCE COUNTY, OHIO,

Plaintiff - Appellee,

v.

L. ROBERT KIMBALL and ASSOCIATES,

Defendant - Appellant

BEFORE: WELLFORD and NORRIS, Circuit Judges;
and COOK, District Judge.*

Upon consideration of the petition for rehearing filed by the appellee, the court concludes that the issues raised therein were fully considered upon the original oral argument decision of this case.

It is therefore ORDERED that the petition for rehearing be and it hereby is DENIED.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

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*The Honorable Julian A. Cook, Jr., Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

APPENDIX C

Opinion of the United States
District Court for the
Southern District of Ohio
Western Division

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

BOARD OF COUNTY COMMISSIONERS OF LAWRENCE COUNTY, OHIO,

Plaintiff,

vs.

L. ROBERT KIMBALL AND ASSOCIATES,

Defendant.

No: C-1-85-0667

OPINION AND ORDER GRANTING SUMMARY JUDGMENT TO PLAINTIFF ON COUNT III AND DENYING CROSS-MOTION FOR SUMMARY JUDGMENT ON COUNT III AND THE COUNTERCLAIM TO COUNT III BY DEFENDANT

This matter is before the Court on plaintiff's motion for summary judgment of Count III of the second amended complaint (doc. 32), defendant's cross-motion for summary judgment on Count III and the counterclaim to Count III (doc. 36) and plaintiff's reply in support of its motion for summary judgment on Count III (doc. 38).

Defendant characterizes this as an action based upon the efforts of defendant to

enforce its rights under certain agreements between it and the Board of County Commissioners of Lawrence County, Ohio, which were executed on June 19 and June 25, 1971. Under the agreements, L. Robert Kimball and Associates (hereinafter "Kimball") agreed to provide certain preliminary engineering services to Lawrence County in connection with the preliminary studies of a proposed county-wide sewage treatment system. Lawrence County agreed to compensate Kimball for these preliminary services if the sewage project proceeded beyond the preliminary engineering report phase, and also agreed to hire Kimball to perform engineering work for subsequent stages of the project.

Defendant points out that during 1984 it became aware that funding for the county-wide sewage project of Lawrence County had been received, that the project was to proceed, and that the county had hired another engineering

firm to perform engineering services for the project. Kimball made a demand for arbitration under the American Arbitration Association Construction Industry Arbitration Rules in accordance with the arbitration clause contained in the 1971 agreements providing for binding arbitration of all questions in dispute.

Previously, this Court issued an Opinion and Order requiring plaintiff to arbitrate the contractual issues (see doc. 15)[1] We entered our Order in spite of our misgivings that the 1971 agreements may be ultra vires and against public policy because there were no term provisions in the agreements. Obviously, such agreements extended beyond the terms of office of the County Commissioners holding office in 1971.[2] This Court concluded that we were obligated to order arbitration under the authority of Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395 (1967).

We now reconsider our decision in light of AT&T Technologies, Inc. v. Communication Workers of America, Inc., 54 U.S.L.W. 4339 (April 7, 1986), in which the Court held that it is for the Court, in the first instance, to determine whether a dispute is subject to arbitration.

Admittedly, AT&T Technologies, Inc., is a labor case, but the reasoning is equally appropriate in the commercial context. In the instant case, and in AT&T Technologies, Inc., the district court referred to the arbitrator the issue of whether the dispute was arbitrable because one of the party's interpretation of the agreement was at least arguable. The Supreme Court has now held that even in such situation, the issue of whether a dispute is subject to arbitration is for the Court to decide in the first instance. Indeed, in deciding whether the parties have agreed to submit a particular grievance, or in this case, a particular agreement to arbitration, a court

is not to rule on the potential merits of the underlying claim. Id. The sole issue resolved in our previous ruling was that of arbitrability. We now endeavor to address the merits of the parties' claims and the issue of public policy, in light of the arbitrator's decision, holding that the contracts in question are enforceable.

We recognize the narrow scope of review that this Court has in limited instances in which it may vacate an arbitration award under 9 U.S.C. §9. The statute provides in pertinent part that an award may be vacated only "[w]here the arbitrators were guilty of misconduct. . . in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced"; or [w]here the arbitrators exceeded their powers, or so imperfectly executed them that a material, final, and definite award upon the subject

matter was not made: 9 U.S.C. §10(c), (d). Generally, an arbitrator's decision is entitled to great deference and should be upheld absent irrationality or disregard of plain and unambiguous language in the agreement. See National Post Office v. U.S. Postal Service, 751 F.2d 834 (6th Cir. 1985). However, a court may not enforce a contract that is contrary to public policy. See Hurd v. Hodge, 334 U.S. 24, 34-35 (1948). Moreover, a claim arising out of an illegal contract is not a legitimate subject of arbitration, and an award based thereon is void and unenforceable. See 5 Am. Jur. 2d §60, Arbitration and Award. The question of public policy is ultimately one for resolution by the courts. W.R. Grace & Co. v. Local Union 759, 461 U.S. 757, 766 (1982). When public policy is asserted as the basis for vacating an arbitration award, the court is required to make its own, independent evaluation. Transmarine Corporation v. Marc Rich & Co., 480

F.Supp. 352, 358 (S.D. N.Y. 1979). If the contract violates some explicit public policy, the Court is obliged to refrain from enforcing it. The fact that an invalid contract has been arbitrated does not validate it. "Such a public policy, however, must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" W.R. Grace & Co., 461 U.S. at 766 (quoting Muschany v. United States, 324 U.S. 49, 66 (1945)).

When we reviewed this case originally, we were troubled because of the hiatus which existed between 1971 when the parties made their agreement in which Kimball was to perform certain engineering services and was to act as the County's professional representative in all phases of the proposed county-wide sanitary sewage system and 1984, when Kimball came forward to assert its rights under the

contracts. Kimball originally agreed to defer payment by the County for the preliminary engineering report until "completion of financing arrangements prior to the beginning of the final design. . ." See Ex. A, doc. 31, copies of contract attached to second amended complaint, Section V, A. The contracts provided the following clause:

> In the event that any or all of the recommended sewer district projects proceed beyond the Preliminary Engineering Report Phase, the Owner agrees to engage the Engineer to perform all other phases of the work of each sewer district in accordance with this Agreement.

See Ex. A., doc. 31, contract, Section I, A.

In the latter part of 1971 and 1972, Kimball prepared a Preliminary Engineering Report regarding a proposed county-wide sewer system and the proposed improvements of a treatment plant in West Chesapeake, Ohio. However, after 1973, there was no correspondence, discussion, contact, or

activity of any kind on the part of Kimball regarding these reports, and although the reports were to be used as the basis for application for state and federal construction grant loans, no such applications were filed. Nor were the reports a basis for any government funding. In addition, Kimball never attempted to revise or update the reports despite their alleged inadequacies. The hiatus existed from 1973 until 1984 when Kimball sent a demand letter to the county, after reading about the hiring of another firm in the newspaper.

During this period there were changes in the federal laws and regulations concerning the funding of such sewer projects. The Army Corps of Engineers were involved with the County in the preparation of the facilities plan required by the new federal law and in 1978 the County hired an engineering firm, Burgess and Niple, Ltd., to perform the necessary engineering work required of the project, after having

interviewed several engineering firms in October 1977. Plaintiff points out that there was considerable publicity about the activities, including the hiring of the new consultant in 1978 and about activities with the Corps of Engineers regarding the sewer project for Eastern Lawrence County. Yet Kimball did not contact plaintiff until 1984.

For the following reasons, we conclude that the agreements entered into by Lawrence County with Kimball in 1971 are ultra vires and contrary to public policy under Ohio law, because they were so indefinite in time that they extend beyond the life of the Board of County Commissioners.

We reach our conclusion based on the authority of State ex rel Allen v. Lutz, 111 Ohio St. 333 (1924). In this remarkably similar case, the Supreme Court noted:

> The policy of the law is rather against the power of one board of county commissioners to make

> contracts so indefinite in time that the same may extend beyond the life of the board, and thus bind another or future board, although in some cases such a contract may be valid and binding even though the performance of some part may be impossible until after the expiration of the term of the majority of the Board as it existed when the contract was made. Yet the general rule is that such contracts, extending beyond the term of the existing board, and employment of agents or servants of the County for such period, thus tying the hands of a succeeding board, are not looked upon with favor unless the necessity or some special circumstances show that the public good requires such contracts to be made.

In Lutz, Id. at 338-39, the Supreme Court refused to issue a writ of mandamus to require the Board of County Commissioners to make the payment to the sanitary engineer provided for in the contract. Likewise, the Court of Appeals in State ex. Hubbard v. Hilty, 31 Ohio L. Abs. 538, 540 (Allan County 1940) emphasized that contracts are invalid which restrain future commissions from exercising their discretionary power or "performing any of

the duties imposed upon [the commissioners]. . . by law." We find that the public policy in regard to indefinite public contracts is well defined by Lutz, 111 Ohio St. 333 and Hilty, 31 Ohio L. Abs. 538. We also find that we are not precluded from reviewing the factual evidence in support of plaintiff's claim that the contract should be declared void on public policy grounds. See Transmarine Seaways Corporation v. Marc Rich & Co., 480 F.Supp. 352, 358 (S.D. N.Y. 1979) (Court examined the factual evidence to determine whether the agreement had been executed by duress); see also Storer Broadcasting Co. v. American Federation of Television and Radio Artists, 600 F.2d 45, 47 (6th Cir. 1979). Because we can surmise no reason why the public good requires indefinite contracts such as the one at issue here, we conclude that the Kimball contract is void under Ohio law.[3]

Not only do we conclude that the contract under scrutiny was against public policy of Ohio for the reasons stated in Lutz, 111 Ohio St. 333, and Hilty, 31 Ohio L. Abs. 538, we find that the contract was invalid under federal law. Under the 1972 amendments to the Federal Water Pollution Control Act, 33 U.S.C. §1251 et. seq., a new set of federal regulations were established. See 39 Fed. Reg. No. 29 (February 11, 1974). Under the regulations, a preliminary engineering report was no longer adequate to secure a government grant. 40 C.F.R. §35.917 et. seq. Subsequent regulations effective March 1, 1976, 40 Fed. Reg. No. 243 (December 17, 1975) contained mandatory procedures for hiring engineer consultants and require that certain terms be included in the contract with the engineers. See 40 C.F.R. Part 35, Subpart E. The County's 1978 contract with Burgess & Niple contained the required clauses, including the right of

termination by the owner based on default or "for its convenience" and the prohibition of any recovery of lost anticipated profits by the terminated engineer for work not performed. These regulations, as pointed out by plaintiff, reflect the policy of the federal government since World War I, that a public agency should not be exposed to lost future profit claims. See G.L. Christian & Associates v. United States, 312 F.2d 418, 426 (Court of Claims, 1963). In addition, the new federal regulations require a competitive negotiation process consisting of public notice of the requirement for engineering services, 40 C.F.R. §35.937-2, evaluation of qualifications of the interested engineering firms, 40 C.F.R. §35.937-3, and the solicitation and evaluation of proposals, 40 C.F.R. §35.937-4. Therefore, it appears that the contract which is the subject of this litigation would not have passed muster under applicable federal law and

regulations because there was no competitive negotiation process before awarding the contract to Kimball, the life of the project clause was invalid as a matter of federal law, and, even if the County had awarded a contract to Kimball in 1978, it would have had the right to terminate Kimball for default or for its convenience. Furthermore, upon termination, Kimball could not have asserted a claim for lost profits, as it has done in this proceeding.

For the foregoing reasons, plaintiff's motion for summary judgment on Count III of the second amended complaint (doc. 32) is granted, the contracts are declared invalid as a matter of public policy, and the arbitration award is hereby vacated. Defendant's cross-motion for summary judgment on Count III (doc. 36) is denied. A status conference is scheduled for May 27, 1987, at 10:00 a.m., to discuss any remaining issues in the case.

SO ORDERED.

S. Arthur Spiegel
United States District Judge

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[1]Although our Opinion and Order (doc. 15) was entered in response to defendant's motion for a preliminary injunction, the Court treated the motion as if it were styled as a motion to compel arbitration under 9 U.S.C. §4. Therefore, we never addressed or analyzed this case in terms of the defendant's success on the merits, which is one of the traditional four factors that determine whether injunctive relief ought to be granted. See e.g., Warner v. Central Trust Co., 715 F.2d 1121, 1123 (6th Cir. 1983).

[2]County Commissioners in Ohio are elected to serve four year terms. Ohio Rev. Code §305.01(c). As the disputed contract contains no term provision, on its face, the agreement presents an issue regarding whether the members who executed the agreement in 1971, did so in such a manner as to bind successor boards of county commissioners.

[3]We recognize that in some circumstances, the Ohio courts have enforced contracts which exceed the term of office of the county commissioners who executed certain contracts if there were special circumstances and performance was within a reasonable time. However, in this case, there was a hiatus of almost ten years while the county was making arrangements with the federal government and

others to put in the sewer system and the original contracting party did nothing to protect or assert its rights. Moreover, we find the cases cited by Kimball inapposite. In Moor v. United States, 243 F.2d 913 (6th Cir. 1957), the county did not raise the ultra vires defense in its pleadings. In Roettinger v. City of Cincinnati, 49 O.App. 42 (1934), the issue was whether the consideration under a lease agreement was adequate. The lease agreement was for a period of five years and, therefore, was for a definite time, unlike the contract in this case. From our reading of the case, the public good requirement was never discussed.

APPENDIX D

Order and Judgment Entry of
the United States District Court for
the Southern District of
Ohio, Western Division

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

BOARD OF COUNTY COMMISSIONERS OF LAWRENCE COUNTY, OHIO	:	No. C-1-85-667
Plaintiff,	:	ORDER CERTIFYING THAT SUMMARY JUDGMENT ORDER OF MARCH 18, 1987 IS FINAL AND THERE IS NO JUST REASON FOR DELAY OF APPEAL
vs.	:	
L. ROBERT KIMBALL & ASSOCIATES,	:	
Defendant.	:	

This matter came on for consideration of defendant L. Robert Kimball & Associates' Motion (doc. 41) for certification by this Court that its summary judgment order of March 18, 1987 is final and that there is no just reason for delay of appeal. We conclude that defendant's motion is well-taken.

Certification of Rule 54(b), Fed. R. Civ. P. of this Court's summary judgment order of March 18, 1987 will advance the interests of sound judicial administration and justice to

the litigants in this case. We find that the claims decided as final and on the merits by the summary judgment motion are separate from the remaining claims in the case and an immediate appeal of the order would not cause plaintiff to suffer significant hardships, economic or otherwise and may well facilitate the resolution of the remaining claims in this case thereby offsetting any costs incurred by plaintiff's participation in the appeal. Accordingly, pursuant to Rule 54(b), Fed. R. Civ. P. we hereby direct the entry of final judgment on the summary judgment order entered March 18, 1987 in favor of plaintiff on count 3 of its second amended complaint and against the defendant on defendant's cross-motion for summary judgment on its counterclaim to count 3. Said entry of final judgment in favor of plaintiff aforesaid in count 3 of the second amended complaint and on defendant's counterclaim thereto being made on the express

determination by the Court that there is no just reason for delay of appeal of said judgment in favor of plaintiff on count 3 of the second amended complaint and on defendant's counterclaim thereto.

SO ORDERED.

S. Arthur Spiegel
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

BOARD OF COUNTY COMMISSIONERS OF LAWRENCE COUNTY, OHIO	:	CASE NO. C-1-85-667
v.	:	
L. ROBERT KIMBALL & ASSOCIATES	:	JUDGMENT IN A CIVIL CASE

_____ Jury Verdict. This action came before the Court for a trial by jury. - The issues have been tried and the jury has rendered its verdict.

__X__ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

ORDER entered by Judge Spiegel that Accordingly, we hereby direct the entry of final judgment on the summary judgment order entered March 18, 1987 in favor of plaintiff on count 3 of its second amended complaint and against the defendant on defendant's cross-motion for summary judgment on its counterclaim to count 3. Said entry of final judgment in favor of plaintiff aforesaid in count 3 of the second amended complaint and on defendant's counterclaim thereto being made on the express determination by the Court that there is no just reason for delay of appeal of

said judgment in favor of plaintiff on count 3 of the second amended complaint and on defendant's counterclaim thereto.

June 9, 1987
Date

Kenneth J. Murphy
Clerk

Arthur W. Hill
(By) Deputy Clerk

APPENDIX E

Federal Arbitration Act, 9 U.S.C. §§ 9, 10, 11

9 U.S.C §9. AWARD OF ARBITRATORS; CONFIRMATION; JURISDICTION; PROCEDURE

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title [9 U.S.C.S. §§10,11]. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the

proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshall of any district within which the adverse party may be found in like manner as other process of the court.

(July 30, 1947, ch 392 §1, 61 Stat. 672.)

9 U.S.C. §10. SAME; VACATION; GROUNDS; REHEARING

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration --

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the

court may, in its discretion, direct a rehearing by the arbitrators.

(July 30, 1947 ch 392, §1, 61 Stat. 672).

9 U.S.C. §11. SAME; MODIFICATION OR CORRECTION; GROUNDS; ORDER

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration --

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

(July 30, 1947, ch 392, §1, 61 Stat. 673.)

APPENDIX F

40 C.F.R. §35.917-1

40 C.F.R. §35.917-1

CONTENT OF FACILITIES PLAN

Facilities planning must address each of the following to the extent considered appropriate by the Regional Administrator:

(a) A description of the treatment works for which construction drawings and specifications are to be prepared. This description shall include preliminary engineering data, cost estimates for design and construction of the treatment works, and a schedule for completion of design and construction. The preliminary engineering data may include, to the extent appropriate, information such as a schematic flow diagram, unit processes, design data regarding detention times, flow rates, sizing of units, etc.

(b) A description of the selected complete waste treatment system(s) of which the proposed treatment works is a part. The description shall cover all elements of the

system, from the service area and collection sewers, through treatment, to the ultimate discharge of treated wastewaters and management and disposal of sludge. Planning area maps must include major components of existing and proposed treatment works. For individual systems, planning area maps must include those individual systems which are proposed for funding under §35.918.

(c) Infiltration/inflow documentation in accordance with §35.927 et seq.

(d) A cost-effectiveness analysis of alternatives for the treatment works and for the complete waste treatment system(s) of which the treatment works is a part. The selection of the system(s) and the choice of the treatment works for which construction drawings and specifications are to be prepared shall be based on the results of the cost-effectiveness analysis. (See Appendix A to this subpart.) This analysis shall include:

(1) The relationship of the size and capacity of alternative works to the needs to be served, including reserve capacity;

(2) An evaluation of alternative flow and waste reduction measures, including nonstructural methods;

(3) An evaluation of improved effluent quality attainable by upgrading the operation and maintenance and efficiency of existing facilities as an alternative or supplement to construction of new facilities;

(4) An evaluation of the capability of each alternative to meet applicable effluent limitations. (All step 2, step 3, or step 2 + 3 projects shall be based on application of best practicable waste treatment technology (BPWTT), as a minimum. Where application of BPWTT would not meet water quality standards, the facilities plan shall provide for attaining such standards. Such provision shall consider the alternative of treating combined sewer overflows.);

(5) An identification of, and provision for, applying BPWTT as defined by the Administrator, based on an evaluation of technologies included under each of the following waste treatment management techniques;

(i) Biological or physical-chemical treatment and discharge to receiving waters;

(ii) Systems employing the reuse of wastewater and recycling of pollutants;

(iii) Land application techniques;

(iv) Systems including revenue generating applications; and

(v) Onsite and nonconventional systems;

(6) An evaluation of the alternative methods for the ultimate disposal of treated wastewater and sludge materials re-

sulting from the treatment process, and a justification for the method(s) chosen;

(7) An adequate assessment of the expected environmental impact of alternatives (including sites) under Part 6 of this chapter. This assessment shall be revised as necessary to include information developed during subsequent project steps;

(8) For facilities planning begun after September 30, 1978, whether or not prepared under a step 1 grant, an analysis of innovative and alternative treatment processes and techniques that reclaim and reuse water, productively recycle wastewater constituents, eliminate the discharge of pollutants, recover energy or otherwise achieve the benefits described in Appendix E. The provisions of this paragraph are encouraged in all cases. They are required in facilities planning for new treatment works and for treatment works which are being acquired, altered, modified,

improved, or extended either to handle a significant increase in the volume of treated waste or to reduce significantly the pollutant discharges from the system. Where certain categories of alternative technologies may not be generally applicable because of prevailing climatic or geological conditions, a detailed analysis of these categories of alternative technologies is not required. However, the reason for such a rejection must be fully substantiated in the facilities plan;

(9) For facilities planning begun after September 30, 1978, whether or not prepared under a step 1 grant, an analysis of the primary energy requirements (operational energy inputs) for each system considered. The alternative selected shall propose adoption of measures to reduce energy consumption or to increase recovery as long as such measures are cost-effective. Where processes or techniques are claimed to be innovative technology on the

basis of energy reduction criterion contained in paragraph 6e(2) of Appendix 3 to this subpart, a detailed energy analysis shall be included to substantiate the claim to the satisfaction of the Regional Administrator.

(e) An identification of effluent discharge limitations or, where a permit has been issued, the NPDES permit number, and a brief description of how the proposed project(s) will result in compliance with the enforceable requirements of the Act.

(f) Required comments or approvals of relevant State, interstate, regional, and local agencies (see §30.305-8).

(g) A final responsiveness summary, consistent with 40 CFR 25.8 and §35.917-5.

(h) A brief statement demonstrating that the authorities who will be implementing the plan have the necessary legal, financial, institutional, and managerial resources available to ensure the construction,

operation, and maintenance of the proposed treatment works.

(i) A statement specifying that the requirements of the Civil Rights Act of 1964 and of Part 7 of this chapter have been met.

(j) For facilities planning begun after September 30, 1978, whether or not prepared under a step 1 grant, a description of potential opportunities for recreation, open space, and access to bodies of water analyzed in planning the proposed treatment works and the recommended actions. The facilities plan shall also describe measures taken to coordinate with Federal, State, and local recreational programs and the recreational elements of applicable approved areawide WQM plans.

(k) A municipal pretreatment program in accordance with §35.907.

(l) An estimate of total project costs and charges to customers, in accordance with guidance issued by the Administrator.

(m) A statement concerning the availability and estimated cost of proposed sites.

[43 FR 44049, Sept. 27, 1978, as amended at 44 FR 10302, Feb. 16, 1979].

APPENDIX G

40 C.F.R. 35.937-2, 35.937-3, 35.937-4

40 C.F.R. §35.937-2 PUBLIC NOTICE

(a) Requirement. Adequate public notice as paragraph (a)(1) or (2) of this section provide, must be given of the requirement for architectural or engineering services for all subagreements with an anticipated price in excess of $25,000 except as paragraph (b) of this section provides. In providing public notice under paragraphs (a)(1) and (2) of this section, grantees must comply with the policies in §§35.936-2(c), 35.936-3, and 35.936-7.

(1) Public announcement. A notice of request for qualifications should be published in professional journals, newspapers, or publications of general circulation over a reasonable area and, in addition, if desired, through posted public notices or written notification directed to interested person, firms, or professional organizations inviting the submission of statements of qualifications.

The announcement must clearly state the deadline and place for submission of qualification statements.

(2) Prequalified list. As an alternative to publishing public notice as in paragraph (b) of this section, the grantee may secure or maintain a list of qualified candidates. The list must:

(i) Be developed with public notice procedures as in paragraph (a)(1) of this section;

(ii) Provide for continuous updating; and

(iii) Be maintained by the grantee or secured from the State or from a nearby political subdivision.

(b) Exceptions. The public notice requirement of this section and the related requirements of §§35.937-3 and 35.937-4 are not applicable, but may be followed, in the cases described in paragraphs (b)(1) through (3) of

this section. All other appropriate provisions of this section, including cost review and negotiation of price, apply:

(1) Where the population of the grantee municipality is 25,000 or less according to the latest U.S. census.

(2) For step 2 or step 3 of a grant, if:

(i) the grantee is satisfied with the qualifications and performance of an engineer who performed all or any part of the step 1 or step 2 work;

(ii) The engineer has the capacity to perform the subsequent steps; and

(iii) The grantee desires the same engineer to provide architectural or engineering services for the subsequent steps.

(3) For subsequent segments of design work under one grant if:

(i) A single treatment works is segmented into two or more step 3 projects;

(ii) The step 2 work is accordingly segmented so that the initial contract for preparation of construction drawings and specifications does not cover the entire treatment works to be build under one grant; and

(iii) The grantee desires to use the same engineering firm that was selected for the initial segment of step 2 work for subsequent segments.

40 C.F.R. §35.937-3

EVALUATION OF QUALIFICATIONS

(a) The grantee shall review the qualifications of firms which responded to the announcement or were on the prequalified list and shall uniformly evaluate the firms.

(b) Qualifications shall be evaluated through an objective process (e.g., the appointment of a board or committee which, to the extent practicable, should include persons

with technical skills).

(c) Criteria which should be considered in the evaluation of candidates for submission of proposals should include:

(1) Specialized experience and technical competence of the candidate or firm and its personnel (including a joint venture, association or professional subcontract), considering the type of services required and the complexity of the project;

(2) Past record of performance on contracts with the grantee, other government agencies or public bodies, and with private industry, including such factors as control of costs, quality of work, and ability to meet schedules;

(3) The candidate's capacity to perform the work (including any specialized services) within the time limitations, considering the firm's current and planned workload;

(4) The candidate's familiarity with types of problems applicable to the project; and

(5) Avoidance of personal and organizational conflicts of interest prohibited under State and local law and §35.936 16.

40 C.F.R. §35.937-4 SOLICITATION AND EVALUATION OF PROPOSALS

(a) Requests for professional services proposals must be sent to no fewer than three candidates who either responded to the announcement or who were selected from the prequalified list. If, after good faith effort to solicit qualifications in accordance with §35.937-2, fewer than three qualified candidates respond, all qualified candidates must be provided requests for proposals.

(b) Requests for professional services proposals must be in writing and must contain the information necessary to enable a

prospective offeror to prepare a proposal properly. The request for proposals must include the solicitation statement in §35.937-9(a) and must inform offerors of the evaluation criteria, including all those in paragraph (c) of this section, and of the relative importance attached to each criterion (a numerical weighted formula need not be utilized).

(c) All proposals submitted in response to the request for professional services proposals must be uniformly evaluated. Evaluation criteria shall include, as a minimum, all criteria stated in §35.937-3(c) of this subpart. The grantee shall also evaluate the candidate's proposed method to accomplish the work required, including, where appropriate, demonstrated capability to explore and develop innovative or advanced techniques and designs. The grantee's evaluation shall comply with §35.936-7.

(d) Proposals shall be evaluated through an objective process (e.g., the appointment of a board or committee which, to the extent practicable, should include persons with technical skills. Oral (including telephone) or written interviews should be conducted with top rated proposers, and information derived therefrom shall be treated on a confidential basis, except as required to be disclosed under State or local law or to EPA under §35.937-6.

(e) At no point during the procurement process shall information be conveyed to any candidate which would provide an unfair competitive advantage.

APPENDIX H

40 C.F.R. Part 35, Subpart E, Section 5

40 C.F.R. Part 35 Subpart E,

Section 5

TERMINATION

(a) Either party may terminate this agreement, in whole or in part, in writing, if the other party substantially fails to fulfill its obligations under this agreement through no fault of the terminating party. However, no such termination may be effected unless the other party is given (1) not less than ten (10) calendar days written notice (delivered by certified mail, return receipt requested) of intent to terminate, and (2) an opportunity for consultation with the terminating party before termination.

(b) The owner may terminate this agreement, in whole or in part, in writing for its convenience if the termination is for good cause (such as for legal or financial reasons, major changes in the work or program requirements, initiation of a new step) and the

engineer is given (1) not less than ten (10) calendar days written notice (delivered by certified mail, return receipt requested) of intent to terminate, and (2) an opportunity for consultation with the terminating party before termination.

(c) If the owner terminates for default, an equitable adjustment in the price provided for in this agreement shall be made, but (1) no amount shall be allowed for anticipated profit on unperformed services or other work, and (2) any payment due to the engineer at the time of termination may be adjusted to the extent of any additional costs the owner incurs because of the engineer's default. If the engineer terminates for default or if the owner terminates for convenience, the equitable adjustment shall include a reasonable profit for services or other work performed. The equitable adjustment for any termination shall provide for payment to the engineer for

services rendered and expenses incurred before the termination, in addition to termination settlement costs the engineer reasonably incurs relating to commitments which had become firm before the termination.

(d) Upon receipt of a termination action under paragraphs (a) or (b) above, the engineer shall (1) promptly discontinue all services affected (unless the notice directs otherwise), and (2) deliver or otherwise make available to the owner all data, drawings, specifications, reports, estimates, summaries, and such other information and materials as the engineer may have accumulated in performing this agreement, whether completed or in process.

(e) Upon termination under paragraphs (a) or (b) above, the owner may take over the work and prosecute the same to completion by agreement with another party or otherwise. Any work the owner takes over for completion will be completed at the owner's risk, and the owner

will hold harmless the engineer from all claims and damages arising out of improper use of the engineer's work.

(f) If, after termination for failure of the engineer to fulfill contractual obligations, it is determined that the engineer had not so failed, the termination shall be deemed to have been effected for the convenience of the owner. In such event, adjustment of the price provided for in this agreement shall be made as paragraph (c) that this clause provides.

APPENDIX I

Ohio Revised Code §6117.01

O.R.C. §6117.01 SEWER DISTRICTS.

For the purpose of preserving and promoting the public health and welfare, boards of county commissioners may by resolution lay out, establish and maintain one or more sewer districts within their respective counties, outside of municipal corporations, and may have a registered professional engineer make such surveys as are necessary for the determination of the proper boundaries of such district. Each district shall be designated by an appropriate name or number. Any board may acquire, construct, maintain, and operate such main, branch, intercepting, or local sewer, or ditch, channel, or interceptor for the temporary retention of storm water, within any such district, and such outlet sewer and sewage treatment or disposal works within or without such district, as are necessary to care for and conduct the sewage or surface water from any part of such district to a proper outlet, so as

to properly treat or dispose of same. Any such board may employ a registered professional engineer to employ necessary assistants upon such terms as are fixed by said board. The board may create and maintain a sanitary engineering department, to be under its supervision and in charge of a registered professional engineer, to be appointed by such board, for the purpose of aiding it in the performance of its duties under section 6117.01 to 6117.45 of the Revised Code, or its other duties regarding sanitation provided by law. Said board shall provide suitable rooms for the use of such department and shall provide for and pay the compensation of such registered professional engineer and all necessary expenses of such registered professional engineer and department which are authorized by such board. Any such registered professional engineer in charge of such department, with the approval of the board, may appoint necessary

assistants and clerks and the compensation of any such assistants and clerks shall be fixed and paid by such board. The board may adopted, publish, administer, and enforce rules for the construction, maintenance, protection, and use of sewers and sewer improvements in its county outside of municipal corporations, and of sewers and sewer improvements within municipal corporations in its county wherever such sewers are constructed or operated by such board, including the establishment and use of connections. Such rules shall not be inconsistent with the laws of this state or the rules of the director of environmental protection. No sewers or sewage treatment works shall be constructed in any county outside of municipal corporations by any person, firm or corporation until the plans and specifications for the same have been approved by the board, and any such construction shall be done under the supervision of the county

sanitary engineer. Any person, firm, or corporation proposing or constructing such improvements shall pay to the county all expenses incurred by the board in connection therewith. The county sanitary engineer may enter upon any public or private property for the purpose of making surveys or examinations necessary for the laying out of sewer districts or designing sewers or treatment works, and may make such surveys and examinations. No person, firm or corporation shall forbid or interfere with the county sanitary engineer or his authorized assistants entering upon such property for such purpose or [of] making such surveys or examinations. If actual damage is done to property by the making of such surveys and examinations, the board shall pay the reasonable value of such damage to the owner of the property damaged, and such cost shall be included in the assessment upon the property benefited by the improvement for which such surveys and examinations are made.